

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 KEITH DALE KRAUSE,

11 Petitioner,

12 v.

13 BELINDA STEWART,

14 Respondent.

CASE NO. C19-1421 MJP

ORDER ADOPTING REPORT AND  
RECOMMENDATION

15  
16 THIS MATTER comes before the Court on Petitioner's Objections (Dkt. No. 7) to the  
17 Report and Recommendation of the Honorable Brian A. Tsuchida, United States Magistrate  
18 Judge. (Dkt. No. 6.) Having reviewed the Report and Recommendation, the Objections, and all  
19 related papers, the Court ADOPTS the Report and Recommendation and DENIES Petitioner's  
20 28 U.S.C. § 2241 Petition.

21 The relevant facts and procedural background are set forth in detail in the Report and  
22 Recommendation. (Dkt. No. 6.) Construing the Petition as seeking habeas relief under 28  
23 U.S.C. § 2254, Magistrate Judge Tsuchida found that: (1) the Petition is time-barred; (2) the  
24

1 Court lacks jurisdiction because the Petition is second or successive, and; (3) the Petition lacks  
2 merit. (Id. at 9-10.) Judge Tsuchida also recommended denying Petitioner a certificate of  
3 appealability (“COA”), directing Petitioner to address whether a COA should issue in his written  
4 objections. (Id. at 10-11.)

5 Petitioner now objects to Magistrate Judge Tsuchida’s construction of the Petition as  
6 seeking habeas relief under 28 U.S.C. § 2254, and Judge Tsuchida’s finding that the Petition  
7 lacks merit. (Dkt. No. 7 at 1-4.) The Court finds both objections unfounded. First, habeas relief  
8 under 28 U.S.C. § 2241 provides the authority for granting habeas relief to a person “who is not  
9 in custody pursuant to a state court judgment” but, rather, who is in custody for some other  
10 reason, such as pretrial detention or while awaiting extradition. White v. Lambert, 370 F.3d  
11 1002, 1006 (9th Cir. 2004), overruled on other grounds by Hayward v. Marshall, 603 F.3d 546  
12 (9th Cir. 2010). Because Petitioner has been in state custody since 1994 pursuant to a judgment  
13 by the King County Superior Court, 28 U.S.C. § 2254 is the exclusive vehicle for habeas relief.  
14 (Dkt. No. 1, Ex. 2); White, 370 at 1009-10.

15 Second, Petitioner’s primary objection, that his exceptional sentence violates the  
16 Supremacy Clause of the United States Constitution, is fully addressed in the Report and  
17 Recommendation. (Dkt. No. 6 at 9-11.) Because Petitioner has filed previous habeas petitions,  
18 Krause v. Wengler, No. C09-1452, 2010 WL 3502728 (W.D. Wash. Sept. 3, 2010); Krause v.  
19 Stewart, C98-1453-JCC, Dkt. No. 1 (W.D. Wash. Nov. 26, 2001), he must show that his claim  
20 “relies on a new rule of constitutional law, made retroactive to cases on collateral review by the  
21 Supreme Court, that was previously unavailable.” 28 U.S.C. § 2244(b)(2)(A). In this case, as  
22 discussed in the Report and Recommendation, the Ninth Circuit has held that Blakely v.  
23 Washington, 542 U.S. 296, 304-05 (2004), which found that the petitioner’s exceptional sentence  
24


1 violated the Sixth Amendment, does not apply retroactively to cases that became final prior to its  
2 publication, such as Petitioner's. Schardt v. Payne, 414 F.3d 1025, 1027 (9th Cir. 2005).

3 Further, although Petitioner did not address the Report and Recommendation's other  
4 conclusions—that the Petition is time-barred and is second, or successive—the Court finds that  
5 these issues alone preclude the Court from granting habeas relief. (Dkt. No. 6 at 4-7.)

6 The Court therefore ADOPTS the Report and Recommendation and DISMISSES  
7 Petitioner's habeas petition with prejudice. Finding that Petitioner has failed to demonstrate that  
8 a reasonable jurist would disagree that the habeas petition lacks merit, is time-barred, and is  
9 second or successive, the Court declines to issue a Certificate of Appealability.

10  
11 The clerk is ordered to provide copies of this order to Judge Tsuchida, Petitioner, and to  
12 all counsel.

13  
14 Dated December 11, 2019.

15  
16   
17 Marsha J. Pechman  
United States District Judge  
18  
19  
20  
21  
22  
23  
24